Supreme Court, U.S.
FILED
FEB 12 2002
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No. 01-1182

IN THE

SUPREME COURT OF THE UNITED STATES

SONJA HARDIN, LEGAL GUARDIAN
OF STEPHEN SHANE HARDIN, A MINOR,
Petitioner,

versus

ACTION GRAPHICS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
Kentucky Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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27pp

QUESTIONS PRESENTED

1. Should the U. S. Constitutional Right to Privacy be construed so as to abolish a state tort claim for loss of parental consortium against an individual, rather than the State, where such a claim can only be maintained upon the death of a minor child's parent?

2. Is there a rational basis under the United States Constitution for Kentucky's Workers Compensation Act to bar loss of consortium claims where similarly situated consortium claimants are not likewise barred by Kentucky's Motor Vehicle Reparations Act and Kentucky case law, thus impacting the Fourteenth Amendment's Equal Protection Clause of the U. S. Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Sonja Hardin, the legal guardian of Stephen Shane Hardin, a minor, and the respondent, Action Graphics, Inc., a Kentucky nongovernmental corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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SONJA HARDIN, LEGAL GUARDIAN
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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a writ of certiorari issue to review the opinion of the Kentucky Court of Appeals, entered in the above-entitled proceeding on January 12, 2001.

OPINIONS BELOW

The opinion and order of the Kentucky Circuit Court of Jefferson County, Division One, has not been reported and is reprinted in the appendix hereto, pp. 1a-4a, *infra*.

The opinion of the Kentucky Court of Appeals has not been reported and is reprinted in the appendix hereto pp. 5a-8a, *infra*.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on January 12, 2001. The order of the Kentucky Supreme Court denying discretionary review was entered November 14, 2001. The jurisdiction of this Court is invoked pursuant to Article III, Section 2 of the United States Constitution, which provides in pertinent part as follows: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, . . ."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2 of the United States Constitution, which provides in pertinent part as follows: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, . . ."

The Fourteenth Amendment to the United States Constitution, which provides in pertinent part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Statement of Facts

On April 9, 1998, Stephen C. Hardin, a resident of Jefferson County, Kentucky, was operating a cylindrical printing press during his scope of employment with Action Graphics, Inc. [hereafter "Action Graphics"], a printing company in Louisville, Kentucky. The printing press at issue had been improperly modified and maintained by Action Graphics. During its operation on April 9th, Stephen Hardin was caught by the press, suffered multiple blunt head

trauma, and ultimately died from his injuries. Stephen Hardin's wife, Sonja Hardin, was seven months pregnant with Stephen Shane Hardin [hereafter "Shane Hardin"] at the time of her husband's death. Shane Hardin was born June 20, 1998.

B. Proceedings Below

On April 5, 1999, the Petitioner, Sonja Hardin, Legal Guardian of Shane Hardin, filed a Complaint against Action Graphics in Kentucky Jefferson Circuit Court for loss of parental consortium, which was recognized as a cause of action by the Kentucky Supreme Court in *Giuliani* v. *Guiler*, Ky., 951 S.W.2d 318 (1997). Action Graphics moved for a dismissal of the Complaint based upon the exclusive remedy provision of Kentucky's Workers Compensation Act (KRS 342.690(1)), and the holding of *Brooks* v. *Burkeen*, 549 S.W.2d 91 (1977) which bars spousal consortium claims in cases covered by Workers Compensation. KRS 342.690(1) states that "If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive . . ."

Following oral arguments before the Jefferson Circuit Court Judge, the Complaint was subsequently dismissed based upon, not the Kentucky Workers Compensation Act, but on the Federal constitutional "right to privacy" analysis in *Brooks* v. *Burkeen*. In *Brooks*, Kentucky's high court stated, "the Federal constitutional right to privacy has been held to protect the decision of one spouse to act in a way which affects the most basic considerations of a marriage from the veto of the other spouse." The Court went on to hold that "the decision by a spouse to be covered by the Workmen's Compensation Act must be binding upon his or her marital partner if his or her right to privacy is to be protected."

A timely Notice of Appeal was filed, and the appeal was heard by the Kentucky Court of Appeals on December

6, 2000. In the Petitioner's Brief to the Kentucky Court of Appeals, the Petitioner raised, inter alia, the right of privacy issue, and stated, "While it is true that the U. S. Supreme Court has recognized the Right of Privacy in family relationships . . . those cases involve balancing an individual's interest in autonomy against the governmental interest in regulating private conduct. A child's claim for loss of parental consortium neither involves the decedent's autonomy nor a governmental interest." The Petitioner's Brief went on to point out that "despite the analysis in *Brooks,* in 1983 the Kentucky Supreme Court held that spousal loss of consortium claims were not covered by Kentucky's Motor Vehicle Reparations Act, even though the Act provided for survivor's benefits" just like the state's Workers Compensation Act.

The Court of Appeals' opinion, rendered January 12, 2001, upheld the trial court's dismissal, thereby, leaving the holding of *Brooks* v. *Burkeen* intact. On February 12, 2001, the Petitioner filed a Motion for Discretionary Review with the Kentucky Supreme Court, which was denied on November 14, 2001. In the Petitioner's Motion for Discretionary Review, the Petitioner submitted, "that the right to privacy asserted in *Brooks* cannot be harmonized with the U. S. Constitutional Right to Privacy as it has been interpreted by State and Federal courts for the past twenty-four years," and "there exists no rational basis under the United States Constitution for the [Kentucky] Worker's Compensation Act to bar loss of consortium claims where similarly situated consortium claimants are not likewise barred by the Motor Vehicle Reparations Act . . . such application would seemingly impact . . . the United States Constitution's Fourteenth Amendment Equal Protection Clause."

REASONS FOR GRANTING THE WRIT

I. The U. S. Constitutional Right to Privacy Should Not Bar Kentucky's Loss of Parental Consortium Claims.

The U. S. Constitutional Right to Privacy prohibits state and federal encroachment into the lives of individuals. Because it is the individual rather than the State pursuing the loss of consortium claim, the "State Action" requirement of the Fourteenth Amendment to the U. S. Constitution is simply not satisfied. In addition, the U. S. Constitutional Right to Privacy cannot extend to the loss of parental consortium claims, because such claims can only be maintained upon the death of the parent. However, the Right to Privacy does not extend to protect an individual's privacy rights in the choice of employment after death. Finally, the Petitioner can find no Federal or State case law construing the Constitutional Right of Privacy as a bar to a common law tort claim. Nonetheless, The Kentucky Supreme Court in *Brooks* concluded:

> "The decision by a spouse to be covered by the Workmen's Compensation Act must be binding upon his or her marital partner if his or her right to privacy is to be protected . . . It is difficult to conceive of a right more unique and fundamental than the right to work at the job of one's choice." *Brooks* at 93.
>
> "The argument that Section 54 of the Constitution of Kentucky, which prohibits the General Assembly from abolishing causes of action for injury, protects Mrs. Brooks from the operation of the statute [referring to Kentucky's Workers Compensation Act] is fallacious. The result achieved by the statute is required by the Federal constitution which is the 'supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' Constitution of the United States, Article VI, cl. 2." *Brooks* at 94.

II. The Fourteenth Amendment to the U. S. Constitution requires that similarly situated consortium claimants in Kentucky be Treated Equally.

The Kentucky Supreme Court, in *Floyd* v. *Gray,* Ky., 657 S. W. 2d 936 (1983), addressed whether an independent loss of consortium claim was a recoverable injury within the purview of Kentucky's Motor Vehicle Reparations Act ("MVRA"). The MVRA, like Kentucky's Workers Compensation Act, is elective and not mandatory pursuant to Sections 14, 54, and 241 of the Kentucky Constitution. Both of the State's Acts provide survivor benefits to decedents' dependents, and both Acts define the scope of coverage broadly. The MVRA states that "tort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is 'abolished." KRS 304.39-060(2)(b). Kentucky's Workers Compensation Act provides exclusive liability for damages "on account of such [employee's] injury or death." KRS 342.690.

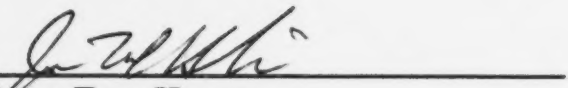
The Kentucky Supreme Court held in *Floyd* that a claim for loss of consortium was an independent cause of action and not a recoverable injury under the MVRA. It is submitted that a loss of parental consortium claim is an independent cause of action not recoverable under either Kentucky's MVRA or Workers Compensation Act. It is not logical to conclude that loss of consortium claims are barred under a State Act relating to workers, and yet survive application of an identical statutory scheme relating to operators of motor vehicles.

CONCLUSION

In the case at bar, Kentucky's appellate courts have construed the U. S. Constitutional Right to Privacy so as to abolish a minor child's tort claim for loss of parental consortium, even though similarly situated consortium

claimants are not likewise barred by a similar statutory framework. As a result, Shane Hardin, who already must grow up without his father, is now left with no remedy to seek compensation for the loss of his father. I respectfully urge this Court to grant the petition in this case, and remand this case to the Kentucky Jefferson Circuit Court for trial.

Respectfully submitted,



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APPENDIX

JEFFERSON CIRCUIT COURT
DIVSION ONE

Case No. 99-CI-01938

ESTATE OF STEPHEN HARDIN, Et Al.,
Plaintiff,

versus

LAWSON SCREEN GRAPHICS, INC., Et Al.,
Defendant.

DISMISSAL ENTERED: June 24, 1999

OPINION AND ORDER—Entered June 24, 1999

This matter comes before the Court on a motion to dismiss filed on behalf of Defendant Action Graphics, Inc. Joining that motion is Defendant, Lawson Screen Products as to Count III of the complaint. The Plaintiff has responded and the matter now stands submitted for final adjudication.

BRIEF SUMMARY

The complaint alleges that the Plaintiff's decedent was killed during the scope of his employment with Defendant Action Graphics while operating a cylindrical press designed, manufactured and installed by Defendant Lawson. As a result, the Plaintiff has filed the within action claiming damages for loss of parental consortium on the grounds of products liability by Lawson and/or negligence by Lawson and/or Action Graphics.

The Defendant Action Graphics has moved this Court to dismiss the Plaintiff's complaint based upon the exclusive remedy provisions of the Worker's Compensation Act. Relying on the holding of *Brooks* v. *Burkeen*, Ky., 549 SW 2d 91 (1977), which bars a spouse's claim for loss of consortium due to the exclusive remedy provision, the Defendant

argues that, by analogy, a child's claim for loss of parental consortium is also barred.

The Plaintiff contends that, since the statute does not specifically exclude loss of consortium claims, they are not barred. It is the Plaintiff's position that if the legislature had intended to exclude such claims, it certainly could have done so by amendment. Further, the Plaintiff argues that such an interpretation would be unconstitutional since sec. 54 of the Kentucky Constitution prohibits the abolition of common law rights of action. The Plaintiff contends that parental and spousal claims for loss of consortium are separate and distinct causes of action, distinguishing *Brooks* on its face.

OPINION

K.R.S. 342.690 (1) states that, "If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

Any analysis of consortium claims in Kentucky must start with *Johnson* v. *Lohre*, Ky. App., 508 SW 2d 785 (1974), later overruled by *Brooks*, supra. In that case the Court of Appeals found that Mrs. Johnson could maintain a cause of action for loss of consortium against her husband's employer, despite the provisions of the Worker's Compensation Act then in place. The Court based its decision on the fact that Mrs. Johnson's claim was an independent cause of action not capable of being abrogated due to sec. 54 of the Kentucky Constitution.

However, in *Brooks*, supra, the Court recognized that wives are no longer wholly dependent upon their husbands for support and therefore do not need special protection under the law. The Court made its decision on the basis of a right in the choice of employment, holding that one spouse

could effectively veto the other's choice of employment by refusing to accept the terms of the Worker's Compensation Act and thus making the employer less likely to hire that spouse. It found that the "...election of coverage brings into play not only the "sweet" provisions of the Act, such as the employer's "liability without fault" but also the "bitter" provisions such as the "exclusive remedy section." at 93. Thus, Mrs. Brooks and Mrs. Childers, the appellants, were prevented from recovering for loss of consortium. Interestingly, since that cause of action had not yet been established at the time that *Brooks* was decided, this Court can only speculate as to whether or not the Court of Appeals would have permitted their cause of action to survive.

A cause of action for loss of parental consortium was finally established in *Guiliani* v. *Guiler*, Ky., 951 SW 2d 318 (1997). In that case, the Supreme Court of Kentucky acknowledged that, "Since 1977, when *Brooks* was decided, 15 courts and two state legislatures have recognized the claim of children for loss of parental consortium." At 319. In his Opinion, Justice Wintershimer followed the genesis of the parental loss of consortium claim from the original spousal consortium claim, to the claim for a parent for the loss of a child, to the newest modification, the claim of a child for the loss of a parent. Thus, it would appear that the analogy drawn by the Defendant between loss of spousal consortium and loss of parental consortium is valid and therefore, the impact of the exclusive remedy provisions of the Worker's Compensation Act upon spousal consortium actions is equally applicable to parental consortium actions. However, the exclusive remedy provision is not available to bar the claims of the Plaintiff against the Defendant Lawson Screen Products, as that statute is applicable to the liability of an "employee", not to the liability of a third party causing injury.

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that the motion of the Defendant Action Graphics, Inc. to dismiss the complaint herein is granted.

IT IS FURTHER ORDERED that the motion of the Defendant Lawson Screen Products is denied.

This is a final and appealable order and there is no just cause for delay.

/s/ Ernest A. Jasmin
Ernest A. Jasmin, Judge
Jefferson Circuit Court
Division One

Date: 6/24/99

ENTERED IN COURT
JUNE 24, 1999

RENDERED: JANUARY 12, 2001; 2:00 p.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 1999-CA-001646-MR

SONJA HARDIN, Legal Guardian of
Stephen Shane Hardin, a minor - - - *Appellant*

v.

ACTION GRAPHICS, INC. - - - - - *Appellee*

AND:

THOMAS SHAUN GRAY, in infant, by and
through his statutory guardian, natural
mother and next friend, PENNY JONES - *Appellant*

Appeal from Hardin Circuit Court
Honorable Hugh W. Roark, Judge
Action No. 99-CI-00071

ROBERT JACKIE YATES and
PHILLIPS BROTHERS OF HARDIN
COUNTY, INC. - - - - - - - - *Appellees*

OPINION—AFFIRMING

BEFORE: GUDGEL, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE: In these consolidated appeals we are asked to decide whether a child's claim for loss of parental consortium falls within the purview of Kentucky's Workers' Compensation Act and, as a result, is barred by its exclusive remedy provisions. We conclude that such claims — like claims for loss of spousal consortium — are barred by the provisions of KRS 342.690. Thus, we affirm the dismissal of both civil actions.

On April 9, 1998, while acting within the course and scope of his employment with the appellee, Action Graphics Inc., Stephen C. Hardin was tragically killed. In November 1998, Marion T. Gray, a construction worker employed by the appellee, Phillip's Brothers of Hardin County, Inc., was also killed while he worked. Both decedents had elected coverage under the Workers' Compensation Act. KRS 342.395.

Each man was survived by a minor son. Through their legal guardians, each dependent filed a negligence action against his father's employer seeking damages for loss of parental consortium. Ultimately, each action was dismissed by the trial court. These appeals, consolidated for expedience, followed.

Kentucky's Workers' Compensation Board is vested with exclusive jurisdiction to decide matters within the purview of the Workers' Compensation Act. *Shamrock Coal Co., Inc.* v. *Maricle*, Ky. 5 S.W. 3d 130 (1999). Trial courts in these cases are deprived of jurisdiction by the explicit language of the Worker's Compensation Act1. KRS 342.690(1) provides in part as follows:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

The appellants contend that a claim for loss of parental consortium is separate and distinct from those claims contemplated by the exclusive remedy provision of the

---

[1] Of the three general types of "exclusive liability" clauses prevalent in workers' compensation statutes, Kentucky's is among the broadest, excluding the widest array of actions. *See* Arthur Larson, *Larson's Workers' Compensation — Desk Edition*, sec. 66.10 (2000).

Kentucky's Workers' Compensation Act. Our analysis of the pertinent authority does not support that contention.

In *Brooks* v. *Burkeen*, Ky., 549 S.W.2d 91, 93 (1977), the Kentucky Supreme Court concluded that election of coverage under the Act "brings into play not only the 'sweet' provisions of the Act such as the employer's 'liability without fault' but also the 'bitter' provisions such as the 'exclusive remedy section'..." Citing the exclusive remedy provision (and overruling its earlier decision in *Johnson* v. *Lohre*, Ky., 508 S.W.2d 785 (1974)), the court held that a wife could not maintain an action for loss of consortium against her husband's employer. The court concluded that such an exclusion was not barred by section 54 of the Kentucky Constitution.

The appellants seek to emphasize the constitutional "right to privacy" discussion in *Brooks*; they also endeavor to distinguish its holding otherwise from the present case. However, we are persuaded that *Brooks* stands for the proposition that one may not recover for the loss of consortium — spousal or parental — where an injured employee has selected coverage under the Act. The statute is clear and unambiguous and leaves no room for exception. By its terms, the Act encompasses the dependents' cause of action. Consequently, the decedents' employers are subject to no further liability.

Appellants also cite *Floyd* v. *Gray*, Ky., 657 S.W.2d 936 (1983), in which the Kentucky Supreme Court considered whether loss of consortium was a "recoverable injury" in the context of determining whether the provisions of the Motor Vehicle Reparations Act ("MVRA") governed the limitations period for a loss of consortium claim. The court determined that such an action did not fall within the purview of the MVRA's no-fault benefit recovery system and, as a result, that it was not governed by the MVRA's two-year period of limitations. In Floyd, the court was asked to consider the breadth and scope of the MVRA's provisions and concluded that its range did not encompass the plaintiff's loss of consortium claim, holding that such a claim is an independent cause of action. Our review of the

Kentucky's Workers' Compensation Act leads us to conclude that *Floyd* simply does not extend beyond the specific context of MVRA and that its reasoning cannot be stretched to apply to the separate and explicit exclusivity provision of our Workers' Compensation legislation.

The Judgments are affirmed

ALL CONCUR.

BRIEF FOR APPELLANT SONJA HARDIN HARDIN:
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Louisville, KY
Jason Todd Hardin
Louisville, KY

ORAL ARGUMENT FOR APPELLANT SONJA HARDIN:
Jason Todd Hardin
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BRIEF FOR APPELLANT THOMAS SHAUN GRAY:
Gary R. Hillerich
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ORAL ARGUMENT FOR APPELLANT THOMAS SHAUN GRAY:
Gary R. Hillerich
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE ACTION GRAPHICS, INC.:
C. Thomas Hectus
Louisville, KY

BRIEF FOR APPELLEES ROBERT JACKIE YATES AND PHILLIPS BROTHERS OF HARDIN COUNTY, INC:
Reford H. Coleman
Matthew C. Hess
Elizabethtown, KY

ORAL ARGUMENT FOR APPELLEES ROBERT JACKIE YATES AND PHILLIPS BROTHERS OF HARDIN COUNTY, INC.:
Reford H. Coleman
Elizabethtown, KY

SUPREME COURT OF KENTUCKY

2001-SC-0104-D

(1999-CA-2669-MR)

THOMAS SHAUN GRAY, an infant,
by and through his statutory guardian,
natural mother, and next friend,
PENNY JONES — MOVANT

v.

HARDIN CIRCUIT COURT
1999-CI-0711

ROBERT JACKIE YATES AND
PHILLIP'S BROTHERS OF HARDIN
COUNTY, INC. — RESPONDENTS

AND

2001-SC-0109-D
(1999-CA-1646-MR)

SONJA HARDIN, Legal Guardian of
Stephen Shane Hardin, a minor — MOVANT

v.

JEFFERSON CIRCUIT COURT
1999-CI-1938

ACTION GRAPHICS, INC. — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

ENTERED: NOVEMBER 14, 2001

/s/ James E. Lambert
CHIEF JUSTICE

Ky., 549 S.W.2d 91

Evelyn Pinkerton BROOKS, Appellant,

v.

Obie BURKEEN et al., Appellees.

Seretha CHILDERS et al., Appellants,

v.

INTERNATIONAL HARVESTER COMPANY et al., Appellees.

SUPREME COURT OF KENTUCKY.

April 1, 1977

Consolidated appeals were taken from orders of the Livingston Circuit Court, James M. Lassiter, J., and the Jefferson Circuit Court, J. Paul Keith, Jr., J., holding that claims could not withstand motion to dismiss. The Supreme Court, Lukowsky, J., held that widow's recovery for consortium would be limited to damages which she sustained before husband's death and that since his death occurred instantaneously while at work, she consequently lost no services, society, fellowship or affectionate relations prior to his death and accordingly was not entitled to recover for loss of consortium; that minor children of deceased employee were not entitled to recover for loss of parental care; and that widow was not entitled to recover for loss of consortium where husband and his employer had elected coverage by Workmen's Compensation Act.

Affirmed.

James W. Owens, Chartered, Paducah, for appellant, Brooks.

Hughes & Gregory , Murray, for appellee, Burkeen.

Boehl, Stopher, Graves & Deindoerfer, Paducah, for appellee, Allied Structural Steel Corp.

Joe G. Leibson, Louisville, for appellants, Childers et al.

Carl A. Henlein, Louisville, for International Harvester et al.

LUKOWSKY, Justice.

The question presented for decision by these consolidated appeals is whether the following claims can withstand a motion to dismiss. CR 12.02. The trial judges answered the question in the negative and we agree.

I.

Seretha Childers is the widow of Luegean Childers who died on September 23, 1974, of asphyxiation while he was at work and in the process of cleaning out a furnace. The death allegedly occurred as a result of the negligence of his employer and its foreman. Seretha seeks recovery for loss of consortium.

This claim fails because it is well settled law that her recovery would be limited to damages which she sustained before her husband's death. Prosser on Torts, 4th Ed., 899. His death occurred instantaneously while at work. Consequently, she lost no services, society, fellowship or affectionate relations prior to death. *Rogers* v. *Fancy Farm Telephone Co.,* 160 Ky. 841, 170 S.W. 178 (1914); *Loew* v. *Allen*, Ky. 419 S.W.2d 734 (1967).

II.

Samuel Childers and Donald Childers are the minor children of Luegean Childers who died in the manner described in I. They seek recovery for loss of paternal care.

These claims fail because no court or legislature in the United States has yet seen fit to recognize such an action. Prosser on Torts, 4th Ed., 896. We decline the opportunity to be the first to do so.

III.

Evelyn Pinkerton Brooks is the wife of George Brooks who received bodily injuries on September 26, 1973, while he was at work. The injuries allegedly occurred as a result of the negligence of his employer and its foreman. The employer and employee had elected coverage by the

Workmen's Compensation Act. Mrs. Brooks seeks recovery for loss of consortium.

Her position is that *Kotsiris* v. *Ling*, Ky., 451 S.W.2d 411 (1970) and KRS 411.145(2) grant her a right to sue for loss of consortium and that such right may not be taken from her by either the election of her husband and his employer or by the legislature. *Johnson* v. *Lohre*, Ky., 508 S.W.2d 785 (1974).

The weakness of her position is that which is intrinsic in *Johnson*, supra. That case fails to take cognizance of the ethical, social, economic, political and legal developments which have restructured the family unit to meet the demands of life in the last quarter of the twentieth century. The wife is no longer a vassal of her husband and certainly the husband has not become the serf of his wife.

The level of relative equality which we reached in *Colley* v. *Colley*, Ky., 460 S.W.2d 821 (1970) was adjusted to absolute equality by the legislature to meet the demands of times and mores when it adopted the Uniform Divorce Act. The right of each spouse in and to the marital property is determined by a single standard. KRS 403.190. Either spouse, regardless of sex, may be liable to the other for maintenance. KRS 403.200. Either or both spouses may be required to pay for the support of their children. KRS 403.210. Custody of children is awarded by reference to a single standard. KRS 403.270.

The reality of an ever increasing cost and standard of living has forced an ever increasing number of wives to find employment outside the home and a corresponding number of husbands to be exposed to the dubious joys of household chores. Truly the relationship has been changed by the evolution of modern standards from one of master and servant to one of primary independence of the spouses and secondary interdependence of the spouses.

The Federal constitutional right to privacy has been held to protect the decision of one spouse to act in a way which affects the most basic considerations of a marriage

from the veto of the other spouse. A spouse's access to contraceptive devices may not be denied. *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). See also *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed2d 349 (1972). The decision of one spouse to undergo an operation which will result in sterilization is binding on the other. *Ponter* v. *Ponter*, 135 N.J.Super. 50, 342, A.2d 574 (1975). The decision of a wife to have an abortion is binding on the husband. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

We are convinced that the decision by a spouse to seek and accept employment upon terms and conditions solely satisfactory to that spouse is at least as private, personal and worthy of protection, and certainly more universally ethically acceptable, than any of the above. It is difficult to conceive of a right more unique and fundamental than the right to work at the job of one's choice. If the spouse of the person seeking covered employment may retain his or her right to damages from the employer for loss of consortium by the simple expedient of failing to consent to the application of the Act that spouse is given, in many cases, an effective veto of the other spouse's employment. Certainly, many employers would be unwilling to stand the risk of such a lawsuit and, consequently, would decline employment to the spouse seeking it in the absence of such a consent. The decision by a spouse to be covered by the Workmen's Compensation Act must be binding upon his or her marital partner if his or her right to privacy is to be protected.

This election of coverage brings into play not only the "sweet" provisions of the Act such as the employer's "liability without fault" but also the "bitter" provisions such as the "exclusive remedy section", KRS 342.690, effective January 1, 1973, which provides:

> "If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of

> all other liability of such employer to the employe, his legal representative, husband or wife, parents, dependants, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

and our case law which holds that a fellow employee is similarly insulated. *Miller* v. *Scott*, Ky., 339 S.W.2d 941 (1960).

The argument that Section 54 of the Constitution of Kentucky, which prohibits the General Assembly from abolishing causes of action for injury, protects Mrs. Brooks from the operation of the statute is fallacious. The result achieved by the statute is required by the Federal constitution which is the "supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Constitution of the United States, Article VI, cl. 2.

We are satisfied that the protection of the right to privacy is available whether it be in the form of proscription of state law requiring the contrary or refusal to recognize the civil suit of the spouse of the employee against the allegedly offending employer and fellow employee.

Johnson, supra, is overruled.

The judgments are affirmed.

All concur.